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Did Expressions Hair Design v. Schneiderman Reconstitute the Bygone Lochner Era: How a New Case about Free Speech Is like an Old Case about the Right to Contract

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DID *EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN* RECONSTITUTE THE BYGONE *LOCHNER* ERA: HOW A NEW CASE ABOUT FREE SPEECH IS LIKE AN OLD CASE ABOUT THE RIGHT TO CONTRACT

Jesse D.H. Snyder & Andrew F. Gann, Jr.*

I. INTRODUCTION

In *Expressions Hair Design v. Schneiderman*, a seemingly innocuous eleven-page slip opinion, Chief Justice John G. Roberts Jr. made manifest that the communicative effects of any law are considered speech subject to some level of scrutiny under the First Amendment.[1] In some ways, that conclusion is the logical extension of an ever-expanding view starting in the

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1. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150–51 (2017) ("Those written or oral communications would be speech, and the law—by determining the amount charged—would indirectly dictate the content of that speech . . . . Because it concluded otherwise, the Court of Appeals had no occasion to conduct a further inquiry into whether § 518, as a speech regulation, survived First Amendment scrutiny.").

1920s of what constitutes speech under the First Amendment.[2] By recognizing that behavior influenced by law constitutes speech, *Schneiderman* achieved a quiet acme for an idea many have already come to accept.[3] That almost anything could be construed as speech was inevitable given the unremitting trajectory of jurisprudence in this area.[4] But *Schneiderman* also portends a vehicle to challenge any law as abridging free-speech rights.[5] In a different era, and under a different constitutional provision, the Supreme Court scrutinized, and often ruled as unconstitutional, many governmental laws and regulations.[6] In 1905, *Lochner v. United States* recognized a potent weapon against business regulation: the right to contract under the Fourteenth Amendment.[7] Not until 1937 did the Court revisit and decline to continue recognizing such a right as a bulwark against democratically enacted laws.[8] The *Lochner* era is often a term of opprobrium[9]; yet the case still has its champions.[10] Is *Schneiderman* the new *Lochner*?

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2. *See* Geoffrey R. Stone & Eugene Volokh, *A Common Interpretation: Freedom of Speech and the Press*, NAT'L CONST. CTR.: CONST. DAILY (Dec. 1, 2016), https://constitutioncenter.org/blog/a-common-interpretation-freedom-of-speech-and-the-press ("But starting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s. Today, the legal protection offered by the First Amendment is stronger than ever before in our history.").

3. *See id.*

4. *See id.*

5. *See* Ronald Mann, *Argument Analysis: Merchants Seem to Fall Short in Challenge to New York Statute Banning Credit-Card "Surcharges,"* SCOTUSBLOG (Jan. 11, 2017, 10:49 AM), http://www.scotusblog.com/2017/01/argument-analysis-merchants-seem-fall-short-challenge-new-york-statute-banning-credit-card-surcharges/ ("Breyer plainly saw the case through the lens of traditional pricing regulation and worried that any serious scrutiny of the statute threatened to cast a shadow on economic regulations long considered plainly valid . . . .").

6. *See* Andrew Hamm, *Dueling Perspectives on* Lochner v. United States, SCOTUSBLOG (June 3, 2016, 1:33 PM), http://www.scotusblog.com/2016/06/dueling-perspectives-on-lochner-v-united-states/.

7. *See id.* ("In a five-to-four opinion written by Justice Rufus Peckham, the Court struck down the regulation on the ground that it violated an individual's liberty of contract, which the majority held was implicit in the Fourteenth Amendment.").

8. *See* David Kopel, *Online Symposium: The Bar Review Version of* NFIB v. Sebelius, SCOTUSBLOG (July 6, 2012, 5:31 PM), http://www.scotusblog.com/2012/07/online-symposium-the-bar-review-version-of-nfib-v-sebelius/ (providing an overview of three 1937 cases overruling *Lochner*-era restrictions on Congress's authority).

9. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2615–16 (2015) (Roberts, C.J., dissenting) ("In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* . . . .").

Identifying *Schneiderman* as a without bound endorsement that conduct influenced by law is speech for purposes of the First Amendment, this paper argues that litigants may use the case to challenge any law or regulation—at least at some level. In three parts, this paper reviews *Lochner* and its atmospherics, delineates the Court's first-speech jurisprudence through *Schneiderman*, and discusses how *Schneiderman* presents a renewed opportunity to challenge any law or regulation. This paper does not take a position on whether the Court was correct in *Lochner*, and this paper does not weigh in on whether principles emanating from *Lochner* could or should salve modern dilemmas. This paper, at bottom, addresses the litigation-tactic consequences of *Schneiderman* and the implications that arise from the decision.

II. THE RISE AND FALL OF THE *LOCHNER* ERA

In 1895, the New York state legislature passed the Bakeshop Act.[11] The legislature used the British Bakehouse Regulation Act of 1863 as a model, thereby seeking to ameliorate certain sanitation and working conditions.[12] Section 110 stated that "no employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day."[13]

Joseph Lochner owned Lochner's Home Bakery,[14] and he was charged with violating the Bakeshop Act on the basis that one of his employees worked longer than sixty hours in one week.[15] The state government fined Mr. Lochner $25 for the violation.[16] In 1901, Mr. Lochner was charged once again with a similar violation:[17] "the defendant, 'wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread,

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10. *See* Hamm, *supra* note 6 ("*Lochner* has 'not enjoyed a good reputation, to put it mildly,' Kens asserts, 'and it deserves that reputation.' But Barnett countered that the case was '[p]robably the right decision.'").

11. *See* Joshua Waimberg, Lochner v. New York*: Fundamental Rights and Economic Liberty*, NAT'L CONST. CTR.: CONST. DAILY (Oct. 26, 2016), https://constitution center.org/blog/lochner-v-new-york-fundamental-rights-and-economic-liberty.

12. *See* Melvin I. Urofsky, Lochner v. New York*: Law Case*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Lochner-v-New-York#ref1182114 (last visited Mar. 30, 2017).

13. Lochner v. New York, 198 U.S. 45, 46 n.1 (1905).

14. Waimberg, *supra* note 11.

15. *See id.*

16. *See id.*

17. *See id.*

and cake bakery and confectionary establishment, at the city of Utica, in this county, to work more than sixty hours in one week.'"[18] Mr. Lochner filed a demurrer, arguing, among other things, that "the facts stated did not constitute a crime."[19] The Oneida County Court denied the demurrer, and the case progressed to trial.[20] Mr. Lochner was convicted and "sentenced to pay a fine of $50, and to stand committed until paid, not to exceed fifty days in the Oneida County jail."[21]

Mr. Lochner filed an appeal in the New York Appellate Division Fourth Department,[22] arguing "that the regulations interfered with the right to earn a living."[23] In a 3–2 opinion, the appellate division rejected the argument and upheld his conviction.[24] Mr. Lochner filed an appeal in the New York Court of Appeals, and that court affirmed in a 4–3 opinion.[25]

Having exhausted his options in state court, Mr. Lochner petitioned for a writ of certiorari in the Supreme Court. During the pendency of his case before the Court, he changed attorneys.[26] Mr. Lochner's new attorney, Henry Weismann, had an acute understanding of and familiarity with the Bakeshop Act.[27] Before becoming an attorney, Mr. Weismann was a lobbyist for the Journeyman Bakers Union and proponent of the sixty-hour work week codified in the Bakeshop Act.[28] From his experience as a bakeshop owner, Mr. Weismann eventually became a skeptic of the law he once supported because, in his view, the Bakeshop Act operated in a manner "unjust to the employers."[29] With a matured view of the Bakeshop Act, Mr. Weismann argued that the Constitution protected Mr. Lochner's right to make a contract with an employee, free from governmental interference.[30] According to Mr. Weismann, "the treasured freedom of the individual . . . [is] swept away under the guise of the police power of the State."[31]

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18. *Lochner*, 198 U.S. at 46.
19. *Id.* at 46–47.
20. *See id.* at 47.
21. *Id.*
22. *See id.*
23. Waimberg, *supra* note 11.
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *Id.*
30. *See id.*
31. *Id.*

In a landmark (and infamous) 5–4 opinion, the Court agreed with Mr. Lochner that the Bakeshop Act was an unconstitutional infringement on his right to contract.[32] Writing for the majority, Justice Rufus Peckham concluded that "[t]he statute necessarily interferes with the right of contract between employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer."[33] Recognizing this interference, Justice Peckman explained that "[t]he general right to make a contract in relation to [Mr. Lochner's] business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."[34] In dissent, Justice John Marshall Harlan, joined by Justices Edward Douglass White and William R. Day, asserted that "the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety."[35] Justice Oliver Wendell Holmes Jr., penned a solo dissent, arguing that the Fourteenth Amendment does not embody the type of "paternalism" that the right to contract seems to assume when thwarting democratically enacted laws:

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[36]

Commentators thereafter have referred to the next thirty years as the *Lochner* era, in which the Court ruled consistently that labor regulations are unconstitutional.[37] The timeframe coincided with and stymied efforts to

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32. *See* Lochner v. New York, 198 U.S. 45, 53 (1905).
33. *Id.*
34. *Id.* (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).
35. *Id.* at 67 (Harlan, J., dissenting).
36. *Id.* at 75 (Holmes, J., dissenting).
37. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 316–17 (1936) (striking down federal legislation regulating the coal industry); United States v. Butler, 297 U.S. 1, 77–78 (1936) (finding that the Agriculture Adjustment Act was an unconstitutional exercise of power); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (striking down federal legislation mandating a minimum wage level for women and children); Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (striking down federal regulation of child labor); Adams v. Tanner, 244 U.S. 590, 596–97 (1917) (striking down state legislation preventing privately-owned

secure New Deal legislation. The Court defiled from *Lochner*, voiding the Agriculture Act of 1933[38] and the Bituminous Coal Conservation Act of 1935,[39] among others.[40]

Frustrated by an inability to pursue and secure his New Deal legislation, and leveraging a landslide victory in the 1936 presidential election, President Franklin Delano Roosevelt introduced the Judicial Procedures Reform Bill of 1937.[41] This bill, commonly referred to as the "court packing plan," provided retirement at full pay for any justice of the Supreme Court over the age of 70.[42] President Roosevelt justified the bill under the auspice that a justice's age could have a negative impact on the Court.[43] Under its prescribed terms, if a justice refused to retire, the President would have the opportunity to appoint an "assistant" who could in turn vote on the outcome of any case.[44] This plan would, in effect, allow President Roosevelt to "neutralize Supreme Court justices hostile to his New Deal."[45]

Before Congress could vote on the Judicial Procedures Reform Bill of 1937, the Court—through a shift in position by Justice Owen Roberts—issued an opinion that made implementation of the "court packing plan" unnecessary.[46] In *West Coast Hotel Co. v. Parrish*, the Court was given the opportunity to revisit an earlier decision in *Adkins v. Children's Hospital*.[47] *Adkins* ruled unconstitutional a federal law mandating a minimum wage

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employment agencies from assessing a fee); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (concluding that it was outside the scope of the state-police power to prohibit employment contracts that bar workers from joining a union); Adair v. United States, 208 U.S. 161, 179–80 (1908) (striking down federal legislation prohibiting railroad companies from demanding that a worker not join a labor union).

38. *Butler*, 297 U.S. at 77–78.

39. *Carter*, 298 U.S. at 316–17.

40. *See, e.g.*, *Adkins*, 261 U.S. at 561 (striking as unconstitutional federal legislation mandating a minimum wage level for women and children in the District of Columbia, noting that "[t]o sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members").

41. *See This Day in History: Roosevelt Announces "Court-Packing" Plan*, HISTORY.COM, http://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan (last visited Mar. 30, 2017).

42. *See id.*

43. *See id.*

44. *See id.*

45. *Id.*

46. Following the Supreme Court's decisions, the Senate struck down the Judicial Procedures Reform Bill of 1937 by a vote of 70–22 in July 1937. *See id.*

47. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

level for women and children.[48] In *West Coast Hotel*, the Court considered a similar law under the State of Washington that "authorize[d] the fixing of minimum wages for women and minors."[49] This time, with Justice Roberts's famous "switch in time to save the nine," the Court upheld Washington's minimum wage law as a valid regulation.[50] The Court observed, "[w]e think that the views thus expressed are sound and [*Adkins*] was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed."[51]

Fourteen days later, the Court demonstrated that *West Coast Hotel* was no outlier. This time, the Court was faced with determining the constitutionality of the National Labor Relations Act of 1935.[52] In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, the Court held that Congress had the power, under the Commerce Clause, to regulate labor relations.[53] The Court embraced an expansive view of federal power in the area of contractual relations between employers and employees:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[54]

While neither *West Coast Hotel* nor *Jones & Laughlin Steel* explicitly overruled *Lochner*, the erstwhile case had fallen. After *Jones & Laughlin Steel*, the Court upheld the constitutionality of the Social Security Act of 1935 in two separate opinions.[55] As the Court summed up nearly twenty years after *West Coast Hotel*, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be

48. Adkins v. Children's Hosp., 261 U.S. 525, 563 (1923).
49. *West Coast Hotel*, 300 U.S. at 386.
50. *See id.* at 399–400.
51. *Id.* at 397.
52. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22 (1937).
53. *See id.* at 37.
54. *Id.* (citing Schechter Corp. v. United States, 295 U.S. 495 (1935)).
55. *See* Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937); Helvering v. Davis, 301 U.S. 619, 639–41 (1937).

unwise, improvident, or out of harmony with a particular school of thought."[56] *Lochner* had lost its deregulating force.[57]

In some ways *Lochner* has become a slur,[58] invoked when rights are read into the Constitution that the invoker believes should not exist.[59] To some, the expansion of individual rights has given rebirth to *Lochner*, recasting deregulation on the basis of economic rights as deregulation on the basis of fundamental rights.[60] Skeptics of this revitalized version of substantive due process trace the concept of fundamental rights to footnote four of *United States v. Carolene Products Co.*, a 1938 opinion written by Justice Harlan F. Stone, in which the Court observed a constitutional duty to engage in a "more searching judicial inquiry" into the protection of "discrete and insular minorities."[61] Whether jurisprudence in the area of fundamental rights is misguided exceeds the scope of this paper. But when the Constitution is used as a counter-majoritarian means to render a governmental act unlawful, the typical refrain is to cite *Lochner* and cast the decision as undermining democratically enacted laws.[62] Although the

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56. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (citations omitted).

57. Some commentators argue that *Lochner* remains alive and well in the Court's current fundamental rights jurisprudence. *See generally* David E. Bernstein, Lochner *Era Revisionism Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 60 (2003) ("It turns out, however, that *Griswold*, *Roe*, and their progeny can be traced back to *Lochner* . . . . Most prominent of these rights was liberty of contract, but the Taft Court expanded *Lochner* to protect other rights as well, including freedom of speech and the right to send one's child to private school.").

58. Ian Samuel & Dan Epps, *OT2016 #11: "Close to Using a Swear,"* FIRST MONDAYS (Jan. 16, 2017), http://www.firstmondays.fm/episodes/2017/1/16/ot2016-11-close-to-using-a-swear.

59. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) ("Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for 'judicial self-restraint.'" (citation omitted)).

60. *See id.* at 2617–18; *see also* Johnson v. United States, 135 S. Ct. 2551, 2571 (2015) (Thomas, J., dissenting) (noting that "the Court began [to] shift[] the focus of its substantive due process (and equal protection) jurisprudence from economic interests to 'discrete and insular minorities'").

61. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Alito, J., dissenting) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).

62. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 878 (2010) (Stevens, J., dissenting) ("The most basic is that we have eschewed attempts to provide any all-purpose, top-down, totalizing theory of 'liberty.' That project is bound to end in failure or worse. The Framers did not express a clear understanding of the term to guide us, and the now-repudiated

concept of unenumerated fundamental rights—what they are and whether should they exist—is contentious, the latent emergence and understanding of a certain enumerated right may prove to have the most expansive deregulatory effect yet: the First Amendment's right to free speech.

III. A LOGICAL CONCLUSION OF EXPANSIVE FREE-SPEECH RIGHTS 100 YEARS IN THE MAKING: DOES *SCHNEIDERMAN* PRESAGE DEREGULATING CONSEQUENCES?

Only in the past century has the Supreme Court began to exposit on the contours of free-speech protection, culminating in the *Schneiderman* principle that all conduct abiding by or violating law constitutes some form of speech.[63] How the Court has interpreted and reinterpreted the First Amendment in the past century aids in understanding how *Schneiderman* enables free-speech rights that intersect with and reinvent the potential of *Lochner*.

A. The Evolution of Free-Speech Rights from Schenk *to* Schneiderman

The First Amendment makes plain that "Congress shall make no law . . . abridging the freedom of speech."[64] Although the First Amendment says "Congress," the Supreme Court has held that speakers are protected against the entire panoply of governmental agencies and actors, whether federal, state, local, legislative, executive, or judicial.[65] Yet the First Amendment does not restrain private individuals or organizations—it limits action by the government only.

The Supreme Court was reticent about the First Amendment until 1919.[66] Then, in *Schenck v. United States*, the Court made explicit that, in the words of Tom Goldstein (founder of the inimitable SCOTUSblog), it "was going to take the First Amendment right to free speech seriously."[67] Shortly after the United States entered into World War I, Congress passed

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Lochner line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good." (internal footnote omitted)).

63. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017); *see also* Stone & Volokh, *supra* note 2.

64. U.S. CONST. amend. I.

65. *See* Stone & Volokh, *supra* note 2.

66. *Schenck v. United States*, C-SPAN: LANDMARK CASES, http://landmarkcases.c-span.org/Case/5/Schenck-v-United-States (last visited Mar. 30, 2017).

67. *Id.*

the Espionage Act of 1917, aiming to prohibit interference with military operations or recruitment, to prevent insubordination in the military, and to stall support of hostile enemies during wartime.[68] Around that time, Charles Schenck organized the distribution of 15,000 leaflets to prospective draftees, using the following message in an attempt to persuade resistance to the draft: "Long Live The Constitution Of The United States; Wake Up America! Your Liberties Are in Danger!"[69] Mr. Schenck was arrested for, indicted on, and convicted of "conspir[ing] to violate the Espionage Act . . . by causing and attempting to cause insubordination . . . and to obstruct the recruiting and enlistment service of the United States."[70]

Mr. Schenck and one other individual sought to overturn their convictions on grounds of their free-speech rights, but the Supreme Court affirmed the lower court's judgment.[71] In a unanimous opinion, Justice Holmes sketched that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[72] Yet Justice Holmes reminded that "the character of every act depends upon the circumstances in which it is done."[73] He famously reflected that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[74] Upholding the convictions, Justice Holmes concluded that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[75]

Roughly eight months later, in *Abrams v. United States*, Justice Holmes dissented from an opinion affirming convictions under the same law and under similar circumstances (i.e., one of the *Abrams* pamphlets read "Workers—Wake Up?"),[76] shifting his position and offering the marketplace-of-ideas stimulus for the modern interpretation of the First Amendment:

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68. *See* Joshua Waimberg, Schenck v. United States*: Defining the Limits of Free Speech*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 2, 2015), https://constitutioncenter.org/blog/schenck-v-united-states-defining-the-limits-of-free-speech.

69. *Id.*

70. Schenck v. United States, 249 U.S. 47, 48 (1919).

71. *See id.* at 53.

72. *Id.* at 52.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Abrams v. United States, 250 U.S. 616, 625 (1919) (Holmes, J., dissenting).

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[77]

After *Schenck* and *Abrams*, at least in the context of constitutional interpretation, the Court progressed at a rapid pace over the next hundred years in expounding on and recognizing free-speech rights.[78] *Gitlow v. New York*, a case decided in 1925, incorporated the First Amendment against the states through provisions of the Fourteenth Amendment.[79] In 1927, in *Whitney v. California*, Justice Louis D. Brandeis contributed the idea that political speech in particular should receive special protection as a foundation on which government relies: "a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."[80] Justice Brandeis also espoused the modern sentiment that more speech is better than less speech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[81] After *Whitney*, in 1931, the Court curtailed the government's ability to censor or restrain speakers from publishing content.[82] In 1939, a law

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77. *Id.* at 630; *see* United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (quoting and endorsing the marketplace of ideas concept from *Abrams*).

78. *See* Stone & Volokh, *supra* note 2 ("But starting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s. Today the legal protection offered by the First Amendment is stronger than ever before in our history.").

79. *See* City of Ladue v. Gilleo, 512 U.S. 43, 45 n.1 (1994) ("The First Amendment provides: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' The Fourteenth Amendment makes this limitation applicable to the States."); *see also* Stone & Volokh, *supra* note 2.

80. Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

81. *Id.* at 377; *see, e.g.*, Alvarez, 132 S. Ct. at 2550 (citing with approval *Whitney*, 274 U.S. at 377).

82. *See* Near v. Minnesota, 283 U.S. 697, 719 (1931) ("The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.") (citing Dailey v. Superior Court, 112 Cal. 94, 98 (1896)).

prohibiting all demonstrations in public parks or all leafleting on public streets was held unconstitutional.[83] In 1943, the Court recognized that students could refrain from pledging allegiance to the flag, holding "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[84]

After a brief waylay, the Warren Court reinvigorated a debate that persisted beyond Chief Justice Earl Warren's tenure.[85] In 1964, the Court observed that an "erroneous statement is inevitable in free debate,"[86] requiring libelous allegations against news media to include a demonstration that the false statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[87] By 1965, civil rights and anti-abortion protesters could not be silenced merely because passersby could respond violently to their speech.[88] In 1969, the Court permitted the Ku Klux Klan to march on because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[89] That same year, the Court permitted high-school students to protest by wearing black armbands in school so long as the conduct did not "materially and substantially" interfere with school operations.[90] After 1971, people could wear jackets emblazoned with "Fuck

83. *See* Schneider v. State, 308 U.S. 147, 160 (1939) ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.").

84. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

85. *See* Stone & Volokh, *supra* note 2 ("There are generally three situations in which the government can constitutionally restrict speech under a less demanding standard.").

86. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

87. *Id.* at 279–80.

88. *See* Cox v. Louisiana, 379 U.S. 536, 557 (1965) ("The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement.").

89. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citing Dennis v. United States, 341 U.S. 494, 516–17 (1951)).

90. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byers, 363 F.2d 744, 749 (5th Cir. 1966)).

the Draft" on the back when entering courthouses.[91] In 1974, the Court reaffirmed the "heavy presumption" against prior restraints, enabling the publication of classified information.[92] By 1977, automobilists could cover up state mottos found on issued license plates.[93]

Unlike other areas of law, the Rehnquist Court carried on where the Warren Court left off in the context of free-speech rights.[94] In 1989, flag burning became protected speech.[95] In 1992, statutes prohibiting cross burning could not be sustained as alleviating unprotected fighting words.[96] In 2000, the Court ruled unconstitutional a law compelling cable television operators that broadcasted sexually-oriented programming to limit their transmissions to hours when children were unlikely to view the material.[97] Although reiterating that obscene speech and child pornography are unprotected, in 2002, the Court expounded that the government cannot prevent the creation of computer images depicting sexually explicit images of children.[98]

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91. *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

92. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (citing Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70 (1963)).

93. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.").

94. *See* Ronald Collins, *Ask the Author: Paul Moke on Earl Warren—The Man & His Measure*, SCOTUSBLOG (Nov. 27, 2015, 12:39 PM), http://www.scotusblog.com/2015/11/ask-the-author-paul-moke-on-earl-warren-the-man-his-measure/.

95. *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) ("We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.").

96. *See* R.A.V. v. St. Paul, 505 U.S. 377, 396 (1992) ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

97. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 826 (2000) ("When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression. We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause.").

98. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) ("The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a

The Roberts Court has hastened the inexorable progression of free-speech rights.[99] In 2010, the Court concluded that a statute proscribing videos of women crushing animals and other depictions of extreme animal cruelty was unconstitutional under the First Amendment as "substantially overbroad."[100] That same year, corporations acquired free-speech rights.[101] One year later, protesters had a constitutional right to brandish signs proclaiming "God Hates F**s" and "God Hates the USA/Thank God for 9/11" outside a soldier's funeral.[102] In 2012, the Court rendered unconstitutional a federal law criminalizing false claims of being a recipient of a military medal.[103] In 2014, the Court constrained the government's latitude to curb aggregate political contributions because spending money is a form of speech.[104] Returning to license plates, in 2015, the Court clarified that a license plate itself can act as speech, if only on behalf of the government.[105] *Schneiderman* is the most recent evolution in this area.

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significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.").

99. Ronald Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/ ("By that measure, the Roberts Court has sometimes enriched the First Amendment by way of unprecedented protection, while at other times it has devalued the currency of that fundamental freedom.").

100. *See* United States v. Stevens, 559 U.S. 460, 464–66, 482 (2010) ("We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.").

101. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

102. Snyder v. Phelps, 562 U.S. 443, 447–48, 458 (2011).

103. *See* United States v. Alvarez, 567 U.S. 709, 716 (2012) ("Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example, speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.").

104. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1462 (2014) ("The Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—quid pro quo corruption—in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*.").

105. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015) ("For the reasons stated, we hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design.").

B. Schneiderman *Caps How Conduct Oriented Around Law Implicates the First Amendment*

Schneiderman represented a battle between merchants and credit-card networks over the surcharges that merchants pay when they accept cards in retail transactions.[106] In 1976, Congress banned surcharges at the federal level but allowed that ban to lapse in 1984.[107] New York then passed its law using the same language as the lapsed federal statute.[108] The law was for many years almost irrelevant because credit-card networks imposed similar rules in their merchant contracts.[109] Multibillion-dollar antitrust settlements, spearheaded by retailers like Wal-Mart, eliminated many of those contractual restrictions, thereby resurrecting the salience of the law against surcharges.[110] At all times relevant, the states with laws similar to New York included California, Florida, Colorado, Connecticut, Kansas, Maine, Massachusetts, Oklahoma, and Texas.[111] Conventional understanding suggested that the laws did not prevent discounts for cash—just the added surprise of a surcharge on top of the advertised price.[112] According to Professor Ronald Mann, "the distinction between offering a discount for cash (or checks) and imposing a surcharge for cards might seem like a small thing, but the protracted legislative battles over the question show that both merchants and card networks think the difference is crucial."[113]

Five merchants challenged the New York anti-surcharge statute on the basis of their free-speech rights, arguing that the law prevented merchants from using the word "surcharge" as a way to describe the higher price they

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106. *See* Ronald Mann, *Argument Preview: Merchants Bring Payment-Card Interchange Wars to the Supreme Court*, SCOTUSBLOG (Jan. 3, 2017, 5:06 PM), http://www.scotusblog.com/2017/01/argument-preview-merchants-bring-payment-card-interchange-wars-supreme-court/ [hereinafter *Argument Preview*].

107. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1147 (2017); Daniel Fisher, *Cash Price or Credit? Supreme Court Says That Might Be First Amendment Question*, FORBES (Mar. 29, 2017), https://www.forbes.com/sites/danielfisher/2017/03/29/cash-price-or-credit-supreme-court-says-that-might-be-first-amendment-question/2/#4ffa15703862.

108. *See* Adam Liptak, *Justices Side with Free-Speech Challenge to Credit Card Fees*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2017/03/29/business/supreme-court-credit-card-fees.html?smid=tw-share&_r=0.

109. *See id.*

110. *See* Fisher, *supra* note 107.

111. David G. Savage, *Supreme Court Rules Merchants May Pursue Free-Speech Challenge to Disclose Credit Card Fees*, L.A. TIMES (Mar. 29, 2017, 1:30 PM), http://www.latimes.com/politics/la-na-pol-court-creditcard-fees-20170329-story.html.

112. *See Argument Preview*, *supra* note 106.

113. *Id.*

charge to credit-card users.[114] In 2013, District Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York preliminarily enjoined enforcement of the law on the basis that preventing merchants from describing how surcharges fit into pricing abridges their right to free speech.[115] According to Judge Rakoff, favoring the communication of discounts over surcharges was inconsistent with the First Amendment:

> Alice in Wonderland has nothing on section 518 of the New York General Business Law. Under the most plausible interpretation of that section, if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% "swipe fee." But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved.[116]

In 2015, the U.S. Court of Appeals for the Second Circuit vacated the preliminary injunction and remanded with a mandate to dismiss the merchants' claims.[117] Judge Debra Ann Livingston observed that the law did not regulate speech, concluding that the regulation was aimed at unprotected conduct only.[118] Judge Livingston explained that "although the difference in the consumer's reaction to the two pricing schemes may be puzzling purely as an economic matter, we are aware of no authority suggesting that the First Amendment prevents states from protecting consumers against irrational psychological annoyances."[119] Following the Second Circuit's decision, the Fifth Circuit concluded that a similar Texas statute targeted unprotected

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114. *See id.*

115. *See* Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 449–50 (S.D.N.Y. 2013) ("Accordingly, for the foregoing reasons, the Court hereby preliminarily enjoins the defendants from enforcing section 518 of the New York General Business Law during the pendency of this case, and denies defendants' motion to dismiss in full.").

116. *Id.* at 435–36.

117. Expressions Hair Design v. Schneiderman, 808 F.3d 118, 144 (2d Cir. 2015).

118. *See id.* at 131, 133 n.9.

119. *Id.* at 133.

conduct as well,[120] while the Eleventh Circuit ruled that Florida's surcharge ban violated the First Amendment.[121]

The merchants in *Expressions Hair Design* filed a petition for writ of certiorari, which the Court granted in September 2016. The Court also granted the acting solicitor general's motion for leave to participate in oral argument.[122] The merchants argued that the law prevented them from offering "the truthful statement that [they] are imposing a surcharge for use of a [credit] card."[123] "By forbidding the surcharge label," the merchants asserted, "the statute effectively prevented them from using truthful information to influence the behavior of their customers."[124] New York countered by identifying "a host of long-standing state and federal statutes . . . that prohibit or limit various charges above a merchant's benchmark price," noting that none have been upset on First Amendment grounds.[125]

The case generated an impressive volume of amicus briefs: "twelve in support of the merchants, ten in support of New York, and one (from the United States) in support of neither party."[126] Ahead of oral argument, Professor Mann was skeptical of the merchants' argument: "The biggest problem with the merchants' position is that their attack may not match the statute before the court. New York defends its statute as a classic pricing control—outlawing the specific pricing practice of charging cardholders more than the list price of a commodity."[127]

During oral argument on January 10, 2017, the lawyers cast the case as either innocuous price scheming or heavy-handed speech restrictions.[128]

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120. *See* Rowell v. Pettijohn, 816 F.3d 73, 80–81 (5th Cir. 2016) ("Precisely what the merchants maintain they are prevented from 'characterizing' is what is prohibited economic conduct under the law: imposing surcharges.").

121. *See* Dana's R.R. Supply v. Att'y Gen., 807 F.3d 1235, 1251 (11th Cir. 2015) ("By holding out discounts as more equal than surcharges, Florida's no-surcharge law overreaches to police speech well beyond the State's constitutionality prescribed bailiwick. For that reason, we conclude that § 501.0117 is an unconstitutional abridgement of free speech.").

122. Expressions Hair Design v. Schneiderman, 137 S. Ct. 615 (2016) ("Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.").

123. *Argument Preview*, *supra* note 106.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* Adam Liptak, *Supreme Court Considers Role of Free Speech in Explaining Credit Card Fees*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/business/supreme-court-credit-card-fees-free-speech.html.

Deepak Gupta, a lawyer for the merchants, framed the issue as all about truthful speech: "This case is about whether the state may criminalize truthful speech that merchants believe is their most effective way of communicating the hidden cost of credit cards to their customers."[129] Steven C. Wu, a lawyer for New York, responded that "[t]he First Amendment doesn't prohibit the state from using a previously conveyed price as a baseline for a price regulation."[130] Eric J. Feigin, a lawyer for the federal government, added that a law barring a merchant from informing customers that credit-card users pay more than cash-only customers is constitutional and comports with the First Amendment.[131]

Professor Mann detected two themes from oral argument.[132] First, the parties could not agree or coalesce around a singular understanding of the statute.[133] Second, Justice Stephen G. Breyer, tacitly joined by Justices Sonia Sotomayor and Elena Kagan, did not equivocate in isolating the deregulatory concerns animating from this case:

> We are diving headlong into an area called price regulation. It is a form of price regulation, and price regulation goes on all over the place in regulatory agencies. And so the word that I fear begins with an "L" and ends with an "R"; it's called *Lochner*. And there we go.[134]

Echoing similar thoughts from the two other justices, Justice Breyer explained how he struggled to conclude from the face of the statute that the case justified First Amendment scrutiny:

> What this statute says is "you can't impose a surcharge." And you want to. What's that got to do with speech? I grant you, all business activity takes place through speech. So explain to me what it's got to do with speech. I don't see that in the statute. My statute that

129. *Id.*
130. *Id.*
131. *See id.*
132. *See* Mann, *supra* note 5. Professor Mann detected three themes from oral argument; however, for purposes of this paper, we will address only two of the three themes.
133. *See id.*
134. *Id.*

> I'm reading says you can't charge a surcharge. But you can charge a discount.[135]

Adam Liptak, columnist for the *New York Times*, also observed that Justice Breyer was alarmed over the implication that "court[s] could use the First Amendment to strike down ordinary economic regulations."[136] In the end, Professor Mann distilled that oral argument yielded scant hints beyond conjecture, suggesting that the Justices may avoid "directly addressing the questions that brought the case to the court."[137]

On March 29, 2017, the Court vacated and remanded the judgment in a unanimous decision, generating an opinion by Chief Justice Roberts, a concurrence in judgment by Justice Breyer in which Justice Sotomayor joined, and a concurrence in judgment by Justice Sotomayor in which Justice Samuel A. Alito Jr. joined.[138] Although the Court confirmed the vaticination of a minimalist approach to resolving the case,[139] the decision cemented a long-term project of endorsing a robust definition of what constitutes speech.[140] The opinion by Chief Justice Roberts did not decide whether a violation of the First Amendment occurred,[141] and it did not attempt to interpret how the statute operates on the ground in practice.[142] But the Court enshrined a 100-year experiment by declaring that conduct either following or disobeying law is speech subject to some ambit of constitutional protection.[143]

Chief Justice Roberts made transpicuous that even conduct related to price schemes simpliciter have a valence of free-speech protection:

> [A] law requiring all New York delis to charge $10 for their sandwiches—would simply regulate the amount that a store could collect. In other words, it would regulate the sandwich seller's *conduct*. To be sure, in order to actually collect that money, a store would likely have to put "$10" on its menus or have its employees tell customers that price. Those written or oral communications

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135. *Id.*
136. Liptak, *supra* note 128.
137. Mann, *supra* note 5.
138. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146 (2017).
139. *See, e.g.*, Mann, *supra* note 5.
140. *See* Collins, *supra* note 99.
141. *Schneiderman*, 137 S. Ct. at 1151.
142. *See id.* at 1150–51.
143. *See id.* (internal citation omitted).

> would be *speech*, and the law—by determining the amount charged—would indirectly dictate the content of that *speech*. But the law's effect on speech would be only incidental to its primary effect on conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[144]

While that passage couches simple regulations as dictating conduct, it also suggests that outward manifestations to conform conduct to law is speech. Though Chief Justice Roberts seeks to reassure that minor impingements on communicative abilities will not be unconstitutional, the opinion cannot avoid the obvious implication that a viable, if only fatuous, First Amendment challenge arises whenever law is followed or disobeyed.

To Chief Justice Roberts, notwithstanding a reasonable difference of opinion between the Court and two circuit courts of appeal, law is beyond cavil about speech:

> What the law does regulate is how sellers may communicate their prices . . . . Accordingly, while we agree with the Court of Appeals that § 518 regulates a relationship between a sticker price and the price charged to credit card users, we cannot accept its conclusion that § 518 is nothing more than a mine-run price regulation. In regulating the communication of prices rather than prices themselves, § 518 regulates speech.[145]

The upshot of the Court's opinion is that remand was appropriate because the Second Circuit should determine in the first instance the constitutional test to apply when considering New York's surcharge scheme.[146]

Justice Breyer—the most outwardly fearful justice at oral argument of *Lochner* implications—concurred in judgment, arguing that distinguishing

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144. *Id.* at 1150–51 (emphases added and citation omitted).

145. *Id.* at 1151.

146. The Court also granted, vacated, and remanded the related Fifth Circuit case. *See* Rowell v. Pettijohn, 137 S. Ct. 1431, 1432 (2017) (mem.) ("Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Expressions Hair Design v. Schneiderman*, 581 U.S. ___, 137 S. Ct. 1144, 197 L.Ed.2d 442 (2017).").

between conduct and speech no longer makes sense.[147] Rather, said Justice Breyer, a court should "simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects."[148] Justice Breyer descended from that precept to discuss the varying standards of review for various types of speech, hinting that the New York law at issue was probably constitutional.[149] Yet his marching through the standards of review betrays unresolved concerns advanced during oral argument about deregulation. Justice Breyer concluded by agreeing with Justice Sotomayor's concurrence in judgment,[150] which argued in broad form for certification of interpretation of the law to the New York Court of Appeals.[151]

And with that, while the Court said little about how to resolve the case, it was emphatic that speech—and the First Amendment—are with us and omnipresent when deciding whether to obey or transgress law. The lingering question now is whether a case about surcharges constitutionalized all conduct reacting to law?

C. How Schneiderman *Motivates Litigation à la* Lochner

That *Schneiderman* raises the specter of *Lochner* era deregulation is salient and intriguingly (or perniciously) possible at the margins. Only time will tell just how wide and fraught are those margins. That is not to say *Schneiderman* portends rejuvenated laissez-faire economics, but a case about credit-card surcharges could be the impetus to challenge unpopular or disfavored laws.[152]

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147. *See Schneiderman*, 137 S. Ct. at 1152 (Breyer, J., concurring in judgment).

148. *Id.*

149. *Id.* at 1153 ("In that case, though affecting the merchant's 'speech,' it would not hinder the transmission of information to the public; the merchant would remain free to say whatever it wanted so long as it also revealed its credit-card price to customers. Accordingly, the law would still receive a deferential form of review.").

150. *Id.* ("I also agree with Justice Sotomayor that on remand, it may well be helpful for the Second Circuit to ask the New York Court of Appeals to clarify the nature of the obligations the statute imposes.").

151. *Id.* at 1159 (Sotomayor, J., concurring in judgment) ("The Court's opinion does not foreclose the Second Circuit from choosing that route on remand. But rather than contributing to the piecemeal resolution of this case, I would vacate the judgment below and remand with instructions to certify the case to the New York Court of Appeals to allow it to definitively interpret § 518. I thus concur only in the judgment.").

152. *See* Lyle Denniston, *Argument Analysis: Decide or Remand? That's the Question*, SCOTUSBLOG (Dec. 8, 2014, 3:52 PM), http://www.scotusblog.com/2014/12/argument-analysis-decide-or-remand-thats-the-question/ ("And, he once again revealed his anxiety over a ruling that would go against Amtrak, saying that it not only raised the prospect

Commentary in the wake of *Schneiderman* reflects that a much-anticipated case was ultimately underwhelming.[153] Professor Mann lamented that "the only thing this case does is keep the litigation alive," noting that "the opinion says so little about the First Amendment that it is unlikely to shed much light on future controversies or illuminate academic inquiry."[154] Professors Daniel Epps and Ian Samuel characterized the case as "minimalist," while observing that Chief Justice Roberts's opinion may have started as a concurrence, which garnered a larger coalition than Justice Sotomayor's eventual concurrence in judgment, because that concurrence in judgment carried with it an unusually robust procedural recitation.[155] Daniel Fisher, a commentator for *Forbes*, departed slightly from others, discussing how the case "further strengthens the once controversial Supreme Court doctrine extending First Amendment protection to corporate, as opposed to individual speech."[156] Another commentator, Ian Millhiser, seemed sanguine about the prospect that *Schneiderman* may curb vexatious free-speech litigation against unpopular laws.[157] The Cato Institute hailed the outcome, opining that the holding on what constitutes speech was "an obvious

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of bringing back the *Carter* decision from 1936, but also the much-discredited 1905 decision by the Court in *Lochner v. New York*—the high point of a laissez-faire Court's resistance to government regulation of business.").

153. *See* Scott Bomboy, *Supreme Court to Sort out Credit Card Merchant Fee Dispute*, NAT'L CONST. CTR.: CONST. DAILY (Jan. 9, 2017), https://constitutioncenter.org/blog/supreme-court-to-sort-out-credit-card-noun-dispute ("If you pay a different price for a haircut using a credit card rather than cash, what is that price called? It may seem like splitting hairs, but it's an important free speech matter in front of the Supreme Court on Tuesday.").

154. Ronald Mann, *Opinion Analysis: Justices Offer Minimalist Decision on New York Credit-Card Surcharge Statute*, SCOTUSBLOG (Mar. 30, 2017, 7:01 AM), http://www.scotusblog.com/2017/03/opinion-analysis-justices-offer-minimalist-decision-new-york-credit-card-surcharge-statute/.

155. Dan Epps & Ian Samuel, *Good Behaviour #4: "The Justin Bieber Standard"*, FIRST MONDAYS (Apr. 3, 2017), http://www.firstmondays.fm/episodes/2017/4/3/good-behaviour-4-the-justin-bieber-standard.

156. Fisher, *supra* note 107.

157. *See* Ian Millhiser, *The Supreme Court Quietly Handed Some Very Bad News to Anti-LGBT Businesses*, THINKPROGRESS (Mar. 29, 2017, 7:00 PM), https://thinkprogress.org/the-supreme-court-quietly-handed-some-very-bad-news-to-anti-lgbt-businesses-af1e5d7e5287 ("This explanation by Roberts—that a law does not raise First Amendment problems simply because it has some incidental impact on people's speech—may seem obvious, but it hasn't been obvious at all to conservative litigators seeking to transform the First Amendment into a weapon against business regulation.").

conclusion."[158] In view of the trajectory of free-speech jurisprudence, perhaps *Schneiderman* was obvious indeed. Even so, despite an unassumingly taciturn approach to the merits of the case, dormant effects on how free-speech rights affect litigation will rise to the fore.

Doubtless, *Schneiderman* culminates an ineluctable progression of what falls within the ambit of the First Amendment, leaving stratagems for how to raise constitutional challenges in the future. Although Chief Justice Roberts reassured that simply labeling conduct as speech will not prevent regulation in the main,[159] the Court's holding invites litigation and portends possible deregulatory success in close cases. Recent litigation has harnessed free-speech rights to challenge disfavored laws, and *Schneiderman* enables those challenges to metastasize.

True, easy cases will quickly resolve after *Schneiderman*, but fault lines exist in areas of political unrest. Certainly parties could assert that jaywalking is a form of speech, attempting to upend any enforcement against the expressive conduct of walking across the street outside the white lines.[160] But few would disagree that traffic laws pass constitutional muster as rationally related to the public safety interests of local governments. General laws organizing everyday public interaction and discourse will remain settled without consequence. The effect of *Schneiderman* will be felt as laws gravitate from mundane civic organization to more nuanced and politicized debates about how we govern ourselves.

At each point along the spectrum of the polarized political divide, the body politic should greet *Schneiderman* with circumspection and vigilance. For those in favor of legislation requiring doctors performing abortions to explain sonograms and inform the patient about the implications of her choice,[161] *Schneiderman* makes clear that compelled communication is

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158. Ilya Shapiro & Frank Garrison, *An Important but Limited Victory for Free Speech*, CATO INST.: CATO AT LIBERTY (Apr. 1, 2017, 4:46 PM), https://www.cato.org/blog/important-limited-victory-free-speech.

159. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017).

160. *Cf.* Sawyer v. District of Columbia, 238 A.2d 314, 314–15 (D.C. Cir. 1968) ("Appellant was tried and convicted by the court of a violation of Part I, Art. III, § 12(b) of the Traffic and Motor Vehicle Regulations of the District of Columbia (jaywalking), and sentenced under Part I, Art. XX, § 158 of the Regulations to pay a fine of $150 or, in default thereof, under D.C. Code, 16-706 (Supp. V, 1966), to serve 60 days in jail." (internal footnotes omitted)).

161. *See, e.g.*, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012) ("The amendments require the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and performing the abortion.").

speech subject to a constitutional challenge.[162] The same is true for advocates wishing to enact laws that preclude doctors from inquiring about gun ownership when treating patients. Although the Court divided equally on whether a state could facilitate the payment of collective-bargaining dues owed by nonunion public workers (save those who opt out),[163] advocates of such laws should be leery in the wake of *Schneiderman*.[164] Those in favor of public accommodation laws against sexual-orientation discrimination also should understand the import of *Schneiderman* when businesses refuse to serve individuals based on an expressed prejudice against a disfavored sexuality.[165] Reforms for higher minimum wages likewise will have to contend with free-speech challenges by businesses wishing to decide wages for themselves.[166] Less glamorous, yet pervasive, regulations—such as those requiring physical examinations before dispensing veterinary medicine—bear similar difficulties.[167] *Schneiderman* may even amplify other

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162. *See Schneiderman*, 137 S. Ct. at 1149 n.1 ("[The merchant] displays its prices in this way, however, only because it considers itself compelled to do so by the challenged law if it wants to charge different prices.").

163. *See, e.g.*, Wollschlaeger v. Governor, 848 F.3d 1293, 1300 (11th Cir. 2017) (en banc) ("And that is because some of [Florida's Firearms Owners' Privacy Act's] provisions regulate speech on the basis of content, restricting (and providing disciplinary sanctions for) speech by doctors and medical professionals on the subject of firearm ownership.").

164. See Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083, 1083 (2016), for how the Court was split on the issue decided in *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS CWX, 2013 WL 9825479, at *2 (C.D. Cal. Dec. 5, 2015), whether the State's requirement for teachers to make financial contributions to any union was a violation of the First and Fourteenth Amendments.

165. *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543, 548 (Wash. 2017) ("Stutzman defended on the grounds that the WLAD and CPA do not apply to her conduct and that, if they do, those statutes violate her state and federal constitutional rights to free speech, free exercise, and free association. The Benton County Superior Court granted summary judgment to the State and the couple, rejecting all of Stutzman's claims. We granted review and now affirm.").

166. *See, e.g.*, Int'l Franchise Ass'n v. City of Seattle, 803 F.3d 389, 409 (9th Cir. 2015) ("It is clear that the ordinance was not motivated by a desire to suppress speech, the conduct at issue is not franchisee expression, and the ordinance does not have the effect of targeting expressive activity.").

167. *See, e.g.*, Hines v. Alldredge, 783 F.3d 197, 198 (5th Cir. 2015) ("Texas requires veterinarians to conduct a physical examination of an animal or its premises before they can practice veterinary medicine with respect to that animal. In this case, we must decide whether this requirement violates the First or Fourteenth Amendment. We conclude it offends neither.").

constitutional provisions, morphing cases about open-carry gun rights into cases about self-expression.[168]

While clarity and certainty elude these issues, a dose of common sense should disinfect free-speech infirmities for laws in which no serious dispute exists over their beneficence. Rational optimism remains that antitrust laws and the like will not be reassessed under *Schneiderman*.[169] Hope endures that the right to free speech does not license the freestyle spread of racism by denying public accommodations on the basis of race.[170] And trust persists that *Schneiderman* can never excuse the hanging of a "Whites Only" sign outside a business[171] or the naming of an establishment in a manner that besmirches the progress of a mature society writ large and writ small.[172]

As Justice Antonin Scalia once observed, discerning when a catalyzing issue foments change can be difficult and is often rationalized away as a minor ebb in a larger flow:

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168. *See, e.g.*, Baker v. Schwarb, 40 F. Supp. 3d 881, 894 (E.D. Mich. 2014) ("Plaintiffs do discuss 'symbolic speech' and argue that 'Plaintiffs' First Amendment [free speech] rights were infringed by the officers when their walk was interrupted and they were detained for promoting open carry.'").

169. *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.").

170. *See* Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (upholding Title II of the Civil Rights Act of 1964 on the basis that the congressional record is "replete with testimony of the burdens placed on interstate commerce by racial discrimination"); *see also* Jones v. City of Boston, 738 F. Supp. 604, 605 (D. Mass. 1990) (noting that calling a patron an ethnophaulism at a bar—despite serving him—still satisfies the Title II requirement "of showing that he was denied equal access to a place of public accommodation on the basis of race" because "[t]he term 'n****r' is intimidating by its very nature"); Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966) ("This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.").

171. *See, e.g.*, United States v. City of Jackson, 318 F.2d 1, 3, 16 (5th Cir. 1963) ("Since 1956 the City of Jackson, Mississippi, has maintained sidewalk signs adjacent to the Greyhound, Trailways, and Illinois Central terminals. These signs read, 'Waiting Room for White Only—By Order Police Department' and 'Waiting Room for Colored Only—By Order Police Department.' . . . [S]egregation in interstate transportation violative of the Fourteenth Amendment offends the Commerce Clause.") (footnote omitted).

172. *See, e.g.*, In re Tam, 808 F.3d 1321, 1380 (Fed. Cir. 2015) (Reyna, J., dissenting) ("Whether a restaurant named 'S***S NOT WELCOME' would actually serve a Hispanic patron is hardly the point. The mere use of the demeaning mark in commerce communicates a discriminatory intent as harmful as the fruit produced by the discriminatory conduct.").

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[173]

Whether *Schneiderman* is a wolf remains to be seen—but it is best to stay on guard.

IV. CONCLUSION

Schneiderman marks the completion of one thing and the start of another. In essence, while one door closed in 1937,[174] another opened in 2017.[175] Having reconciled what is speech, the unexplored frontier begs what is permissible regulation. Although no easy answers exist, the resultant uncertainty suggests that more is in flux than meets the eye.[176] The idea that speech can be used as a vehicle against a wide array of laws should give pause to everyone, no matter their variegated political affiliation or alliance. A muscular reading of *Schneiderman* that all conduct is a form of speech could hobble all laws and regulations, whether federal, state, or local. *Schneiderman* is not a clarion call to deregulate into a laissez-faire society, but some may use the First Amendment for just such an outcome. A cautious and tepid response to the idea that all conduct is speech would prevent a return to *Lochner*, but an enthusiastic response would spark a revival. Can too much speech ever be a bad thing? If an inflection point toward harm exists, we may be on the precipice of learning just how powerful speech has become.

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173. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

174. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937).

175. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150–52 (2017).

176. *Cf.* Stephen King, *Stephen King on Donald Trump: 'How Do Such Men Rise? First as a Joke'*, GUARDIAN (Apr. 1, 2017, 5:00 PM), https://www.theguardian.com/us-news/2017/apr/01/stephen-king-on-donald-trump-fictional-voters-truth-about-us-election?CMP=oth_b-aplnews_d-1 (theorizing that general national uncertainty regarding policy follows from officials with little experience being elected to positions of power); Rick Esenberg, *Symposium:* Whitford *is Nothing New*, SCOTUSBLOG (Aug. 9, 2017, 2:24 PM), http://www.scotusblog.com/2017/08/symposium-whitford-nothing-new/ (noting that creating voting districts to ensure proportional "wasted" votes among political parties is not a constitutional right).